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Supreme Court of the United States

OCTOBER TERM, 1954

No. 40

BESSIE B. COX AND JOHN G. THOMPSON, AS ADMINISTRATORS OF THE ESTATE OF SID COX, DECEASED; HENRIETTA A. FARRINGTON, AND HOWARD C. FARRINGTON, PETITIONERS,

vs.

ARTHUR ROTH, AS ADMINISTRATOR OF THE ESTATE OF JAMES DEAN, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 16, 1954

CERTIORARI GRANTED JUNE 7, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 40

BESSIE B. COX AND JOHN G. THOMPSON, AS ADMINISTRATORS OF THE ESTATE OF SID COX, DECEASED; HENRIETTA A. FARRINGTON, AND HOWARD C. FARRINGTON, PETITIONERS,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 5, 1954.

—6642

[fol. a] [Caption omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

No. 4665-M-Civil

Arthur Roth, as administrator of the estate of James Dean, deceased, Plaintiff,

versus

Bessie B. Cox and John G. Thompson, as administrators of the estate of Sid Cox, deceased, Henrietta A. Farrington, and Howard C. Farrington, Defendants

Amended Complaint. Plaintiff Demands Trial by Jury—Filed November 7, 1952

Action under special rule for seamen to sue without security or prepayment of fees for the enforcement of the laws of the United States common and statutory for the protection of the health and safety of seamen at sea.

Plaintiff, complaining of the defendants, respectfully states and alleges upon information and belief:

1. That the defendants are residents of Dade County, Florida.

[fol. 2] 2. That at all times hereinafter mentioned, Sid Cox and H. C. Farrington were residents of Dade County, Florida.

3. That at all times hereinafter mentioned, Sid Cox and H. C. Farrington owned a certain steamship or vessel known as the M/V "Wingate."

4. That at all times hereinafter mentioned, Sid Cox and H. C. Farrington owned, operated, managed, and controlled the aforesaid vessel.

5. That prior to the commencement of this action, Arthur Roth was duly appointed administrator of the estate of James Dean.

6. That Sid Cox is now deceased, and Bessie B. Cox and John G. Thompson have been appointed administrators of his estate.

7. That H. C. Farrington is now deceased and his estate has been distributed and closed.

8. That the estate of H. C. Farrington was distributed to the defendants Henrietta A. Farrington and Howard C. Farrington.

9. That the defendants Henrietta A. Farrington and Howard C. Farrington are made parties to this suit by virtue of them being distributees of the estate of H. C. Farrington.

10. That at all times hereinafter mentioned the decedent, James Dean, was employed on the aforesaid vessel in the capacity of a seaman.

[fol. 3] 11. That at all times hereinafter mentioned, there was and still is in force and effect an Act of Congress known as the Merchant Marine Act, approved June 5, 1920, Sec. 33; commonly know- as the Jones Act, 46 U. S. C., Sec. 688, which Act is applicable hereto.

12. That by reason of the employment of the decedent, James Dean, aboard the vessel as aforementioned, the plaintiff is entitled to maintain this action against the defendants herein under the provisions of the Jones Act.

13. That the decedent, James Dean, suffered death in the course of his employment aboard the vessel aforementioned.

14. That on or about the 22nd day of December, 1949, the aforementioned vessel broke and parts thereof gave way and the vessel was otherwise rendered unsafe.

15. That the aforesaid occurrence was due to the negligence of the decedents, Sid Cox and H. C. Farrington, their agents, servants, and employees, in causing, allowing and permitting the vessel to undertake a voyage in a condition which unduly exposed the decedent, James Dean, to danger; and in causing, allowing and permitting the vessel to put to sea in a damaged, unsafe, and unseaworthy condition without any means or precautions taken to make the vessel staunch and seaworthy; and in addition to the foregoing, the decedents, Sid Cox and H. C. Farrington, their agents, servants, and employees were guilty of fault in failing to provide sufficient, adequate, and proper means, lifesaving appliances and appurtenances and safety devices for the [fol. 4] protection of the decedent, James Dean; and in failing, neglecting, and omitting to navigate the vessel and

take due precautions for the safety of the vessel and the decedent, James Dean; and the decedents, Sid Cox and H. C. Farrington, their agents, servants, and employees were at fault in failing, neglecting, and omitting to give the decendent reasonable opportunity to leave the vessel or provide him with safe and adequate life boats or other means wherewith to leave the vessel; and the decedents, Sid Cox and H. C. Farrington, their agents, servants, and employees were further at fault in that vessel was navigated in an unskillful, improper, careless, reckless, and negligent manner and not in accordance with the method and manner that would be considered good practice by the profession or trade, all of which resulted in the vessel breaking and parts thereof giving way and the decedent, James Dean, suffering death; and the decedents, Sid Cox and H. C. Farrington, their agents, servants, and employees were otherwise careless, reckless, and negligent in the premises.

16. That as a result of the accident aforementioned, the decendent, James Dean, suffered conscious pain, mental anguish and physical suffering from the time of the injury to the time of his death.

17. That the decedent, James Dean, died leaving heirs at law and next of kin on whose behalf this action is being brought.

18. That by reason of the foregoing, the estate, heirs at law and next of kin of James Dean sustained damages in the sum of One Hundred Thousand Dollars ($100,000). [fol. 5] Wherefore, Plaintiff demands trial by jury and judgment, jointly or severally, against the defendants, Henrietta A. Farrington and Howard C. Farrington and against the estate of Sid Cox in the sum of One Hundred Thousand Dollars ($100,000), together with the costs and disbursements of this action.

Rassner & Jennings, (S.) by Milton S. Jennings, Attorneys for Plaintiff.

550 Building, 550 Brickell Avenue, Miami, Florida.

In United States District Court

Motion of Defendants Bessie B. Cox and John G. Thompson as Administrators of the Estate of Sid Cox, Deceased, for Summary Judgment—Filed December 2, 1952

The Defendants, Bessie B. Cox and John G. Thompson, as administrators of the Estate of Sid Cox, deceased, by their undersigned attorney, hereby move the Court to enter Summary Judgment for the said defendants in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure, on the ground that the pleadings and the certificate of the clerk of the County Judges' Court, Dade County, Florida, hereto attached and marked Exhibit A, show that the defendants are entitled to Judgment as a matter of law, as no claim was filed by the Plaintiff in the Estate of Sid [fol. 6] Cox in the County Judges' Court, Dade County, Florida, within eight months from the date of the first publication of the notice to creditors in that estate, as required by Section 733.16, Florida Statutes.

Smathers, Thompson, Maxwell & Dyer, (S.) by Douglas D. Batchelor, Attorneys for Defendants, Bessie B. Cox and John G. Thompson, as Administrators of the Estate of Sid Cox, Deceased.

I hereby certify that a copy of the foregoing Motion for Summary Judgment was mailed to Rassner & Jennings, 550 Brickell Avenue, Miami, Florida, Attorneys for Plaintiff, this 2nd day of December, 1952.

(S.) Douglas D. Batchelor.

Exhibit A to Motion

Certificate

I, Gladys V. Sullivan, Clerk of the County Judges' Court, Dade County, Florida, do hereby certify that the records of this Court reveal that a Petition for Letter of Administration in the Estate of Sid Cox, deceased, were filed in this Court on the 11th day of January, 1951, and that on that date Letters of Administration were issued by the County

Judge to Bessie B. Cox and John G. Thompson; that the notice to creditors in the said Estate was first published on January 12, 1951; that no claims in the said Estate were filed [fol. 7] by Arthur Roth, as administrator of the Estate of James Dean, deceased, within the period of eight months immediately following the first publication of notice to creditors.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the County Judges' Court at Miami, Florida, this 2nd day of December, A. D., 1952.

(S.) Gladys V. Sullivan, Clerk County Judges' Court.
(Seal of County Judges' Court.)

Certificate

In United States District Court

Motion of Defendant, Howard C. Farrington, for Summary Judgment—Filed December 2, 1952

The Defendant, Howard C. Farrington, by and through his undersigned attorneys, hereby moves the Court to enter Summary Judgment for the said Defendant in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure, on the ground that the pleadings and the certificate of the Clerk of the County Judges' Court, Dade County, Florida, hereto attached and marked Exhibit A., show that the Defendant is entitled to Judgment as a matter of law, as no claim was filed by the Plaintiff in the Estate of H. C. Farrington in the County Judges' Court, Dade [fol. 8] County, Florida, within eight months from the date of the first publication of the notice to creditors in that estate, as required by Section 733.16, Florida Statutes.

Smathers, Thompson, Maxwell & Dyer, (S.) by Douglas D. Batchelor, Attorneys for the Defendant, Howard C. Farrington.

I hereby certify that a copy of the foregoing Motion for Summary Judgment was mailed to Rassner & Jennings, 550 Brickell Avenue, Miami, Florida, Attorneys for Plaintiff, this 2 day of December, 1952.

(S.) Douglas D. Batchelor.

EXHIBIT A TO MOTION

I, Gladys V. Sullivan, Clerk of the County Judges' Court, Dade County, Florida, do hereby certify that the records of this Court reveal that a Petition for Letters of Administration in the Estate of H. C. Farrington, deceased, were filed in this Court on the 1st day of March, 1950, and that on that date Letters of Administration were issued by the County Judge to Henrietta A. Farrington; that the notice to creditors in the said Estate was first published on March 2, 1950; that no claims in the said Estate were filed by Arthur Roth, as Administrator of the Estate of James Dean, deceased, within the period of eight months immediately following the first publication of notice to creditors.

[fol. 9] In Witness Whereof, I have hereunto set my hand and affixed the seal of the County Judges' Court at Miami, Florida, this 2nd day of December, A. D., 1952.

(S.) Gladys V. Sullivan, Clerk, County Judges' Court.

(Seal of County Judges Court.)

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT, HENRIETTA A. FARRINGTON, FOR SUMMARY JUDGMENT—Filed December 2, 1952

The Defendant, Henrietta A. Farrington, by and through her undersigned attorneys, hereby moves the Court to enter Summary Judgement for the said Defendant in accordance with the provision of Rule 56 of the Federal Rules of Civil Procedure, on the ground that the pleadings and the certificate of the Clerk of the County Judges' Court, Dade County, Florida, hereto attached and marked Exhibit A, show that the Defendant is entitled to Judgment as a matter of law, as no claim was filed by the Plaintiff in the Estate of H. C. Farrington in the County Judges' Court, Dade County, Florida, within eight months from the date of the first publication of the notice to creditors in that estate, as required by Section 733.16, Florida Statutes.

Smathers, Thompson, Maxwell & Dyer, (S.) by Douglas D. Batchelor, Attorneys for the Defendant, Henrietta A. Farrington.

[fol. 10] I hereby certify that a copy of the foregoing Motion for Summary Judgment was mailed to Rassner & Jennings, 550 Brickell Avenue, Miami, Florida, Attorneys for Plaintiff, this 2nd day of December, 1952.

(S.) Douglas D. Batchelor.

EXHIBIT A—Omitted. Printed Side Page 8 Ante

[fol. 11] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

[Title omitted]

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENTS—Filed December 8, 1952

This cause coming on to be heard upon the motion of the Defendants, Bessie B. Cox and John G. Thompson, as administrators of the Estate of Sid Cox, deceased, and upon the motion of Henrietta A. Farrington and Howard C. Farrington for Summary Judgments as to all of the above name Defendants, and the Court having heard the argument of counsel and being advised in the premises, it is upon consideration.

Ordered, Adjudged and Decreed that the said Motions for Summary Judgments be, and the same are hereby granted, and this cause be, and it is hereby dismissed as to the aforenamed Defendants without leave to amend.

[fol. 12] Done and Ordered at Miami, Florida, this 8th day of December, 1952.

(S.) John W. Holland, Chief Judge.

Bond on appeal for $250.00 filed December 24, 1952, omitted in printing.

[fol. 13] In United States District Court, Southern District of Florida

[Title omitted]

Notice of Appeal—Filed December 24, 1952

Notice is hereby given that Arthur Roth, as Administrator of the Estate of James Dean, deceased plaintiff, in the [fol. 14] above styled cause, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from the summary judgments entered in this cause on the 8th day of December, 1952, dismissing as defendants, Bessie B. Cox and John G. Thompson, as Administrators of the Estate of Sid Cox, deceased, and Henrietta A. Farrington and Howard C. Farrington.

Dated this 24th day of December, 1952.

Rassner & Jennings, (S.) by Milton S. Jennings, Attorneys for Plaintiff; 550 Building, 550 Brickell Avenue, Miami, Florida.

Certificate of service (omitted in printing).

In United States District Court

Appellant's Statement of Points on Appeal—Filed December 24, 1952

The Appellant, Arthur Roth, as Administrator of the Estate of James Dean, deceased, originally Plaintiff [fol. 15] in this cause intends to rely upon the following points on this appeal:

1. The Court erred in sustaining Defendants' Motions for Summary Judgments.

2. The Court erred in not overruling Defendants' Motion for Summary Judgments.

3. The Court erred in its construction of Section 733.16 of the Florida Statutes.

Rassner & Jennings, (S.) by Milton S. Jennings, Attorneys for Appellant; 550 Building, 550 Brickell Avenue, Miami, Florida.

Proof of service (omitted in printing).

[fols. 16-17] Designation of Record, (omitted in printing)

[fol. 18] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 19] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,419

ARTHUR ROTH, as Administrator of the Estate of JAMES DEAN, Deceased,

versus

BESSIE B. COX, and JOHN G. THOMPSON, as Administrators of the Estate of Sid Cox, deceased, ET AL.

Minute Entry of Argument and Submission, dated October 19, 1953, omitted in printing

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[fol. 20] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,419

ARTHUR ROTH, as Administrator of the Estate of JAMES DEAN, deceased, Appellant,

versus

BESSIE B. COX, and JOHN G. THOMPSON, as Administrators of the Estate of Sid Cox, deceased, ET AL., Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Opinion—Filed January 15, 1954.

Before HUTCHESON, Chief Judge, and HOLMES, and BORAH, Circuit Judges.

BORAH, Circuit Judge: On December 22, 1949, the motor vessel Wingate owned by Sid Cox and H. G. Farrington and others sailed from Matanzas, Cuba, and when off the coast [fol. 21] and on the high seas foundered with complete loss of life, including H. C. Farrington, her master, and James Dean, a seaman. In January, 1951, Sid Cox died and

thereafter, in the month of October, 1952, plaintiff, as administrator of the estate of James Dean, brought this action under the Jones Act, 46 U.S.C.A. §688, against the administrators of the estate of Sid Cox and the distributees of the estate of H. C. Farrington. The defendants thereupon filed motions for summary judgment on the ground that plaintiff had not filed with the County Judge of Dade County, Florida—the court having jurisdiction of the probate proceedings in both the Cox and Farrington estates—his notices of claim within eight months from the respective dates of the first publication of notices to creditors as required by F.S.A. 733.16.[1] The District Judge thought that the defendants were entitled to a judgment as a matter of law, by reason of plaintiff's admitted failure to comply with the notice of claim provision of the Florida probate

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[1] Florida Statutes Annotated, Sec. 733.16(1), provides:

"No claim or demand, whether due or not, direct or contingent, liquidated or unliquidated, or claim for personal property in the possession of the personal representative or for damages, including but not limited to actions founded upon fraud or other wrongful act or commission of the decedent, shall be valid or binding upon an estate, or upon the personal representative thereof, or upon any heir, legatee or devisee of the decedent unless the same shall be in writing and contain the place of residence and postoffice address of the claimant, and shall be sworn to by the claimant, his agent or attorney, and be filed in the office of the county judge granting letters. Any such claim or demand not so filed within eight months from the time of the first publication of the notice to creditors shall be void even though the personal representative has recognized such claim or demand by paying a portion thereof or interest thereon or otherwise; and no cause of action, at law or in equity, heretofore or hereafter accruing, including but not limited to actions founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom such claim may be made, whether suit be pending at he time of the death of such person or not, unless such claim be filed in the manner and within the said eight months as aforesaid; * * *"

act and he granted the motions and dismissed the action.

Appealing from this order plaintiff-appellant contends that the statute in question is a statute of limitation; that [fol. 22] its requirements with respect to the filing of a claim within eight months are inconsistent with and impair the uniform operation of the maritime law and accordingly are not applicable to a suit under the Jones Act which provides a limitation of three years. The appellees on the other hand insist that the Florida nonclaim statute while partaking of the nature of a statute of limitations is not solely such; that the statute was enacted as a part of the probate law not primarily for the purpose of barring state claims, but as a part of the procedure which courts must observe in the orderly, expeditious and exact settlement of estates of deceased persons; and that the statute does not disturb the uniformity of law in the maritime field and in no way encroaches upon the rights granted to plaintiff by the Jones Act.

The Jones Act, 46 U.S.C.A. §688, provides that a seaman suffering injury "in the course of his employment may, at his election, maintain an action for damages at law, * * * and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in cases of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law * * * and in such action all statutes of the United States conferring or regulating the rights of action for death in the case of railway employees shall be applicable." The section is specifically drawn to give rights to employees against employers and against no others. It [fol. 23] refers to injuries sustained in the course of "his" (seaman's) employment. It says that "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." Title 45, U.S.C.A. §51 also refers to actions between employer and employee. Thus, there is nothing in the Jones Act which grants to seamen a right to bring an action against anyone except his employer and as the Act does not in terms provide for survival of actions against the estate of the deceased tort-feasor we are

unwilling as in *Nordquist* v. *United States Trust Co. of New York*, 2 Cir., 188 F. 2d 776,[2] to supply what the Congress omitted by reading a survival proviso into the statute where no legislative intent therefor is discoverable. If the law is to be changed it ought to be by an Act of Congress.

In the absence of some specific provision as to the survivability of the causes of action which the statute authorizes the statute must be measured in the light of the common law rule of survival. By the ninth section of the Judiciary Act of 1789 the District Courts of the United States were given exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it." This provision was carried forward into the 1948 revision of the Judicial Code, 28 U.S.C.A. §1333, and the language of the saving clause has been changed somewhat in phraseology though not in intent, as the reviser's note makes clear. [fol. 24] In *The Moses Taylor*, 4 Wall 411, 18 L. Ed. 397, the Court in determining whether the case before it was within the saving clause said: "That clause only saves to suitors, 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common-law courts which is saved, but a common-law remedy." The saving clause neither creates substantive rights in itself nor assents to their creation by the state. It refers only to remedies and to the extent specified permits continued enforcement by the state courts of rights and obligations founded on maritime law. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834. Thus, in *Chelentis* v. *Luckenbach S. S. Co., Inc.*, 247 U. S. 372, 384, 38 S. Ct. 501, 504, 62 L. Ed. 1171, it was said, "under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to de-

[2] In this case the court expressly overruled its former opinion in *The Miramar*, D. C., 31 F. 2d 767, affirmed without opinion 2 Cir., 36 F. 2d 1021, certiorari denied 281 U. S. 752, 50 S. Ct. 355, 74 L. Ed. 1163.

termine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law." It follows that state Legislatures are competent to enact survival statutes which may be enforced as a common-law remedy. While it may be true that admiralty may not enforce the remedy, even by libel in personam, yet it is not an encroachment on admiralty jurisdiction because it is expected from that jurisdiction by the savings clause. Under the common law of Florida as modified by the statutes of the state a cause of action for a tort survives the death of the tort-feasor and may be maintained against his personal representative.[3]

[fol. 25] This brings us to the question whether this suit brought on the common law side of the District Court to enforce a right of action granted by the Jones Act may be commenced within three years after the cause of action accrues, or whether the Florida statute of nonclaim fixing a shorter period of limitation will apply. Section 56 of the Employers' Liability Act[4] provides that "no action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." This provision which was incorporated by adoption in the Jones Act is one of substantive right, setting a limit to the existence of the obligation which the Act creates. *Atlantic Coast Line R. R.* v. *Burnette*, 239 U. S. 199, 201. And it necessarily implies that the action was maintainable as a substantive right, if commenced within three years. Referring to the Jones Act and its proper construction the Supreme Court in *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 392, said: "The statute extends territorially as far as Congress can make it go, and there is nothing in it to cause its operation to be otherwise than uniform. The national legislation respecting injuries to railway employees engaged in interstate and foreign commerce which it adopts has a uniform operation, and neither is nor can be deflected therefrom by local statutes or local views of common law rules. *Second Employers' Liability Cases*, 223 U. S. 1, 51, 55; *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149

[3] Waller v. First Savings & Trust Co., 1931, 103 Fla. 1025, 138 So. 780; F.S.A. 45.11.

[4] 45 U.S.C.A. § 56.

U. S. 368, 378." In *Engel* v. *Davenport*, 271 U. S. 33, 39, a suit founded on the Jones Act was brought in the state court and the contention there made was that §6 of the Employers' Liability Act [5] does not determine the period of [fol. 26] time within which an action may be commenced in the state court. In answering this contention the Court said: "We conclude that the provision of § 6 of the Employers' Liability Act relating to the time of commencing the action, is a material provision of the statutes 'modifying or extending the common law right or remedy in cases of personal injuries to railway employees' which was adopted by and incorporated in the Merchant Marine Act. And, as a provision affecting the substantive right created by Congress in the exercise of its paramount authority in reference to the maritime law, it must control in an action, brought in a state court under the Merchant Marine Act, regardless of any statute of limitations of the State. See *Arnson* v. *Murphy*, 109 U. S. 238, 243." We take it to be now well settled that when a common law action is brought, whether in a federal or in a state court, to enforce a right peculiar to the law of admiralty, the substantive law to be applied is the same as would be applied by an admiralty court. *Chelentis* v. *Luckenbach S. S. Co., Inc., supra; Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927; *Engel* v. *Davenport*, 271 U. S. 33, 46 S. Ct. 410, 70 L. Ed. 813; *Panama R. R. Co.* v. *Vasquez*, 271 U. S. 557, 46 S. Ct. 596, 70 L. Ed. 1085; *Lindgren* v. *United States*, 281 U. S. 38, 46, 50 S. Ct. 207, 211, 74 L. Ed. 686; *Garrett* v. *Moore-McCormick Co., Inc.*, 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 249; *Seas Shipping Co., Inc.*, v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099.

In *Lindgren* v. *United States*, *supra*, the court made these pertinent observations in reference to the Jones Act. It "establishes as a modification of the prior maritime law a rule of general application in reference to the liability of [fol. 27] owners of vessels for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all of the States * * *; and

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[5] This provision as amended was carried forward into 45 U.S.C.A. §56.

that as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject."

In the light of the authorities we hold that the provision of Section 56 of the Employers' Liability Act relating to the time of commencing the action is one of substantive right, setting a limit to the existence of the obligation, which the Act creates and it may not be deflected or impaired by the Florida nonclaim statute. *Pope & Talbot, Inc.* v. *Charles Haen and Haenn Ship Ceiling and Refitting Corporation*, Supreme Court of United States, December 7, 1953, No. 13—October Term, 1953; *Frame* v. *City of New York*, D. C., 34 F. Supp. 194; *The West Point*, D. C., 71 F. Supp. 206.

The judgment of the District Court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

HUTCHESON, Chief Judge, Dissenting:

I go along with the majority through page five of the opinion. I part company with them thereafter, and the reason I do is because the opinion, in dealing with the binding force of the three year period of limitation fixed [fol. 28]in and by the Jones Act as to actions brought under it assumes that the right of action sued on in this suit is afforded by that act, when the exact contrary of this is thus carefully pointed out earlier in the opinion. Saying, "Thus there is nothing in the Jones Act which grants to seamen a right of action against anyone except his employer and as the act does not in terms provide for survival of actions against the estate of the deceased tort-feasor," the majority then goes on to say, "we are unwilling as in *Nordquist* v. *United States Trust Co. of New York*, 188 F(2) 776, so supply what the congress omitted by reading a survival proviso into the statute where no legislative intent therefor is discoverable. If the law is to be changed it ought to be by an Act of Congress."

Notwithstanding this express and vigorous holding that the Jones Act does not grant to the seaman in this case a right to bring the action brought here, and that the action is afforded by the Statutes of Florida, the opinion

goes on to say: "This brings us to the question whether this suit brought on the common law side of the District Court *to enforce a right of action granted by the Jones Act* (emphasis supplied by me) may be commenced within three years after the cause of action accrues, or whether the Florida statute of nonclaim * * * will apply".

With deference, this assumption that the suit is brought to enforce a right of action granted by the Jones Act is contrary to the fact and law of the case, and throws the whole case out of focus by presenting as the question for decision a question that is not here for decision. What is for decision here is this: May the representative of a [fol. 29] seaman, who has elected to sue at law upon a cause of action, the creature of a state statute, take so much of the state law as he likes and reject so much of it as he does not like, or must he take the statutory cause of action *cum onere*, the bitter with the sweet.

I think it has been precisely and many times decided that he must so take it. This was decided in the Harrisburg case, 119 U. S. 214, and in *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, and that case has been uniformly followed and never departed from. As late as in *Levinson* v. *Deupree*, 345, U. S. 651, the Supreme Court reaffirmed the principle while in *Continental* v. *Benny Skou*, 200 F(2) 250, there is an excellent discussion of it, Cf. *Caldarola* v. *Eckert*, 332 U. S. 155, *Engel* v. *Davenport*, 271 U. S. 38, and *Lindgren* v. *United States*, 281 U. S. 38, are correctly cited by the majority as holding that the Jones Act covers the entire field of liability for injuries to seamen as congress has there laid it down. Indeed Lindgren applied the rule so rigidly that it rejected the application of the Virginia death statute on the ground that the Jones Act was complete and comprehensive, and since, under the circumstances of that case, it did not afford a right of action, state law could not be looked to to supplement its coverage.

In *Just* v. *Chambers*, 312 U. S. 583, the Supreme Court of the United States rejected the view of the majority of this court, 113 F(2) 106, that since the action there sought to be maintained was not afforded by the Jones Act, resort could not be had to the action afforded by the Florida State Statutes in favor of the view of the minority, 113 F(2) at 10, that it could be, and there laid down the rule

applicable and controlling here. This is that, though no [fol. 30] right of action was afforded under federal law, the seaman was permitted to sue under the State Act, and the suit was not in breach of the uniformity required in admiralty. Thus reaffirming the rule that, though no action was afforded in admiralty, the State Court action for death could be resorted to by a seaman's representative.

The majority has correctly, I think, held that the Jones Act does not afford the right of action asserted the State Statutes do. If the action sued on is that afforded by the State, then it must be taken *cum onere*, and it may not, I think, be held, as the majority opinion does, that though the Jones Act does not afford the action and the State Statute does, the representative of a seaman suing under the State Action is in a different situation from an ordinary litigant in Florida, in this, that whereas the statute invoked in this case would certainly be valid as to, and a bar against, such a litigant, it would not be as to the plaintiff because his action was brought for the benefit of a seaman. To my mind, reason and authority join in rejecting this view. I respectfully dissent.

[fol. 31] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,419

ARTHUR ROTH, as Administrator of the Estate of JAMES DEAN, deceased,

versus

BESSIE B. COX, and JOHN G. THOMPSON, as Administrators of the Estate of Sid Cox, deceased, et al.

JUDGMENT—January 15, 1954

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, re-

versed; and that said cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, Bessie B. Cox, and John G. Thompson, as Administrators of the Estate of Sid Cox, deceased, and Others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Hutcheson, Chief Judge, dissents."

[fols. 29-32] Petition for rehearing covering 4 pages filed February 2, 1954 omitted from this print, it was denied, and nothing more by order February 5, 1954.

[fols. 33-34] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14,419

[Title omitted]

ORDER DENYING REHEARING—February 5th, 1954

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Hutcheson, Chief Judge, dissents."

[fols. 35-36] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 37] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 691

BESSIE B. COX and JOHN G. THOMPSON, as Administrators of the Estate of SID COX, Deceased, et al., Petitioners,

vs.

ARTHUR ROTH, as Administrator of the Estate of JAMES DEAN, Deceased

ORDER ALLOWING CERTIORARI—Filed June 7, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to to such writ.